**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals,**
**Peter D. O'Connell (Presiding Judge), Patrick M. Meter, and Michael F. Gadola**

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CLAM LAKE TOWNSHIP, a Michigan general law township; and HARING CHARTER TOWNSHIP, a Michigan charter township,

Appellants,

v

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS (THE STATE BOUNDARY COMMISSION), a state administrative agency; TERIDEE LLC, a Michigan limited liability company; and, THE CITY OF CADILLAC, a Michigan home rule city,

Appellees.
_____/

Supreme Court Docket No. 151800

Court of Appeals Case No. 325350

Wexford County Circuit Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket 13-AP-2

# APPELLANTS' REPLY BRIEF IN RESPONSE TO APPELLEE'S BRIEF OF THE CITY OF CADILLAC

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Clam Lake Township and Haring Charter Township (the "Townships") submit this Reply Brief, pursuant to MCR 7.312(E)(3), in rebuttal to the Appellee's Brief filed by the City of Cadillac.

## REPLY TO THE CITY'S INTRODUCTION

The City has attempted to create a false narrative in its introduction, by alleging that the Agreement's sole purpose is to "block economic development" on the Transferred Area. City Brief at p. 1. The City's dissembling is made apparent when one considers the undisputed facts.

First, some correct historical context is needed in order to properly understand why the Townships have had nothing to do with any historical impediments that TeriDee might have faced, with regard to developing the Transferred Area. It is undisputed that, about eight years ago, TeriDee knowingly and voluntarily purchased property that (a) was not in the City, (b) was without City public water or public sewer, (c) was planned for over 20 years for Forest Recreation ("FR"), (d) was zoned FR, and (e) had been denied commercial zoning or planning twice previously. But the Townships have had nothing to do with creating or continuing those circumstances. The FR zoning/planning was imposed by the County, not the Townships.[1] And it was *the SBC*, not the Townships, who decided, on October 3, 2012, that TeriDee's property should *not* be a part of the City because this would be *unreasonable* under the standards of MCL 123.1009. In this accurately-framed context, the City's attempt to hold the Townships up as evil straw men must be rejected. The only thing the Townships' Agreement has done is to *expand* TeriDee's economic development opportunities by allowing a mixed-use development on the Transferred Area, and by supporting that development through the concurrent provision of Haring water and sewer services to the Transferred Area.

The second layer to the City's false narrative is that the Agreement "block[s] development" on the Transferred Area, simply because it would not allow TeriDee to develop the property with

[1] Clam Lake could not exercise zoning powers; it was subject to County zoning. Appendix, 962a.

"big box" and "mid-box" stores, in contravention of the regional land use plan.[2] The City's position is directly contrary to the plain language of Act 425. In the list of factors that are to be considered before local units enter an Act 425 agreement (*see* MCL 124.23), there is no mention whatsoever of private development interests. And there is no requirement that the economic development project be the exact same project that one particular developer wants. Instead, the local units are required to consider "the relationship of the proposed action to any established city, village, township, county, or regional land use plan." MCL 124.23(c). Thus, simply because the Townships do not want to violate the regional land use plan (as TeriDee and the City are specifically proposing), this does not equate to "blocking" development. The Townships have instead entered an Agreement that implements an economic development project that is *consistent* with the regional land use plan, which is exactly what the Legislature intended, as stated in MCL 124.23(c).

**REPLY TO COUNTER-STATEMENT OF FACTS**

The City alleges that, in the circuit court, the Townships accused the Attorney General ("AG") of accepting a "bribe" from TeriDee. City Brief at p. 8. In truth, the Townships never used that word. What the Townships did, instead, was to bring the circuit court's attention to a disturbing pattern of *undisputed* facts, as follows:

- On May 14, 2013, just before TeriDee applied for annexation, the owners of TeriDee began to make, *for the first time*, a series of substantial monetary contribution to the AG, which is the *only* political office involved with SBC decisions. *See* Twp Supp Appeal Brief (circuit court, 10/6/14) at Tab I.
- This series of political donations (which TeriDee acknowledged to be $2,000) culminated with the owners of TeriDee serving as "hosts" of a private, political fundraising event for the AG on August 8, 2013. Appendix, 1605a.
- TeriDee's owners hosted this event in Cadillac (*id*.), even though they do not live in the Cadillac region. Generous "host" donations of $500 were required to be paid. *Id*. This was done while the annexation petition had already been pending before the SBC since June 5,

[2] The circuit court held that TeriDee's development plan "is contrary to regional land use plans." *See* 12/19/14 Opinion on Appeal at p. 12. The City has not disagreed in its pleadings.

2013. Thus, the AG was accepting political money from TeriDee's owners at the same time his office was advising the SBC on TeriDee's annexation petition.

- Just after TeriDee's owners had a private, paid-for meeting with the AG at the August 8, 2013 fundraiser in Cadillac, the owners of TeriDee were so confident that their annexation petition was going to be approved that they quickly erected a sign on their property (*id*., 205a), announcing that their project was "Coming Soon", and would include "big-box" and "mid-box" stores. *Id*.,1294a.

The above facts are *undisputed*. And simply because the Townships pointed out these undisputed facts to the circuit court, the City now accuses the Townships of making claims of "bribes." Again, the Townships have never used that word. That is the word that the City has chosen to use as a description of what, *in its own view*, is necessarily concluded by the above facts.

The City also alleges that, in the circuit court, the Townships accused the AG's office of concealing documents, but that the Townships never substantiated this. City Brief at p. 8. It is correct that the Townships made this argument, but the Townships proved this to be *undisputedly* true. The circuit court pleadings reveal that the Townships had to file a Motion to Correct and Amend the ROP on August 18, 2014 (brief in support filed 8/21/14) because the AG was refusing to include, in the ROP, documentary evidence that the Townships had submitted to the SBC before its decision, showing that the Haring WWTP was already under construction. This raised the specter that the SBC was potentially not including *other* relevant documents that the Township did not already know about, and so the Townships' Motion also sought to compel the SBC to supplement the ROP with *all* records and documents of the SBC proceedings. An Order granting the Townships' motion was entered on September 16, 2014. The result of this was that the SBC was forced, on September 29, 2014, to supplement the ROP with two additional 3-ring binders of material that it had previously withheld – measuring five inches thick – thus nearly doubling the size of the ROP.

Significantly, included in the supplemental ROP materials were documents showing that the Chairman of the SBC, Dennis Schornack, made false statements at the April 16, 2014 adjudicative session. Specifically, with respect to Mr. Schornack's statement that the Haring WWTP was

"[p]otentially fictional . . . no bonds have been issued or anything. There's no engineering studies" (Appendix, 328a-329a), the records in the supplemental ROP show that, when Mr. Schornack made that statement, he was already in possession of information showing that (a) the construction bonds had already been issued, (b) the engineering studies were complete, (c) the construction permits had already been issued by the MDEQ, and (d) the Haring WWTP was on schedule to be available for service by July 2015. *See* Appellants' Supp Appeal Brief (circuit court, 10/6/14) at pp. 9-11, and Tabs F-H. Is it any wonder why the SBC tried to exclude these documents from the record?

In any case, the circuit court records show that the Townships were absolutely correct in their suspicions: the SBC had concealed thousands of pages of documents from the circuit court and the parties, including, specifically, records showing that the SBC Chairperson was either ignorant of the content of the ROP, or was knowingly making false statements. Either way, the SBC's incompetence to determine the validity of an Act 425 agreement was on full display. This is just another reason the Court should overrule *Casco Twp*[3], so that Act 425 is not left in the hands of an agency having no competence to administer or apply that statute.

## REPLY ARGUMENTS

### I. THE CITY WRONGLY INVOKES *STARE DECISIS*

The City makes the exact same mistakes as TeriDee, in wrongly attempting to invoke *stare decisis* as a basis for upholding *Casco*, and so the Townships' adopt their same reply by reference.[4]

### II. MICHIGAN DOES NOT APPLY "*CHEVRON* DEFERENCE" TO AN AGENCY'S DETERMINATION OF ITS OWN JURISDICTION

The City argues that *Casco Twp's* jurisdictional holding was correct because an agency should be afforded judicial deference when determining the scope of its own statutory jurisdiction.

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[3] *Casco Twp v SBC*, 243 Mich App 392; 622 NW2d 332 (2000), *app den*, 465 Mich 855 (2001).

[4] The City does cite one additional case, *Robinson v City of Detroit*, 462 Mich 439 (2000), but that case is inapposite because it dealt with the question of whether the Court should overrule *its own* earlier decisions, not the decision of an inferior court, as would be the case with *Casco Twp*.

City Brief at pp. 13-16. In this respect, the City is tacitly relying on a doctrine that has been adopted by the federal courts, known as "*Chevron*[5] deference," whereby a federal court will defer, under *Chevron*, to an agency's interpretation of a statutory ambiguity that concerns the scope of agency's statutory authority. *See*, e.g., *City of Arlington v FCC*, 133 S Ct 1863, 1868 (2013). The City's position reflects two fundamental errors. First, this Court has expressly rejected "*Chevron* deference," as constituting an unconstitutional impingement on the judiciary's sole authority to determine the meaning of a statute. *In re Complaint of Rovas*, 482 Mich 90, 109-111; 754 NW2d 259 (2008) ("This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now.").[6] This Court instead adheres to the rule that the scope of an agency's jurisdiction is a legal issue, subject to *de novo* review. *Rovas* at 90.

Second, even if "*Chevron* deference" was the law in Michigan, it applies only to an ambiguous statute. *City of Arlington* at 1868. But there is no ambiguity here. The Legislature has not given the SBC *any* authority under Act 425. Thus, even if *Chevron* was the law in Michigan, it would compel a conclusion that the SBC has no jurisdiction to do *anything* with respect to Act 425 agreements. *City of Arlington* at 1882 (holding that *Chevron* deference applies "only when it appears that Congress delegated authority to the agency," and that "in the absence of such a delegation," agency action is "beyond the *Chevron* pale."). And the SBC cannot rely on its jurisdiction over annexation petitions under MCL 123.1001, *et seq.*, as a basis for exercising jurisdiction under a separate statute such as Act 425, because "it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction" by relying on a statutory delegation of jurisdiction over a different subject matter. *City of Arlington* at 1881-82. The correct legal conclusion, therefore, is that the SBC has no jurisdiction to do *anything* with respect to Act 425 agreements.

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[5] *Chevron USA, Inc v NRDC, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

[6] *See* also, LeDuc, Michigan Administrative Law (2015 ed.), §9:19, pp. 656-657 (explaining that the *Rovas* Court expressly rejected *Chevron* deference).

The two Michigan cases cited by the City, *Judges of the 74th Judicial Dist v County of Bay*, 385 Mich 710; 190 NW2d (1971) and *Petition of Labor Mediation Bd v Jackson County Rd Comm'n*, 365 Mich 645; 114 NW2d 183 (1962), do not support a different conclusion. The *74th Judicial Dist* case stands only for the limited proposition that, based on the exhaustion doctrine, a court should not enter a preliminary injunction for the purpose of enjoining an administrative hearing before it occurs, on the basis of a pre-hearing jurisdictional challenge. *74th Judicial Dist* at 728-729. That principle is not implicated here, where the Townships seek only post-hearing relief. The *Labor Mediation Bd* case is even more inapposite. It stands only for the proportion that, in that particular case, the agency properly determined that it had jurisdiction over the subject matter of the appeal. *Labor Mediation Bd* at 654-655. Neither case grants deference to an agency's determination of its own jurisdiction.[7] As held in *Rovas*, Michigan has *never* adopted such a rule.

## III. THE CITY MISCONSTRUES MCL 124.29

The City argues that MCL 124.29 did not prevent the SBC from approving the annexation petition because the Townships' Agreement was not "in effect" until five days after TeriDee's annexation petition was filed. City Brief at pp. 17-18. This reflects a misinterpretation of the statute. MCL 124.29 plainly states that, "while [an Act 425] contract is in effect, another method of annexation . . . *shall not take place*." [Emphasis added]. An annexation does not "take place" until it is *approved* by order of the director of LARA (MAC R 123.23), and so the date when an annexation petition is *submitted* has no relevance for the purpose of applying MCL 124.29. If an Agreement is "in effect" before the Director of LARA approves an annexation, the annexation "shall not take place."

[7] The City's reliance on *Smigel v Southgate Comm Sch Dist*, 388 Mich 531 (1972) is also misplaced. In this respect, the City cites to an isolated part of a dissenting opinion that was not joined by other justices [*id*. at 555 (Swainson, J., dissenting), and so it is not controlling.

## IV. THE CITY'S "PARADE OF HORRIBLES" DOES NOT EXIST

The City posits that the Townships' position, if adopted, would "require a collateral circuit court action to be filed every time an Act 425 Agreement is presented to the Commission." City Brief at p. 16. But this "parade of horribles" would be true only if we were to accept the City's predicate assumption that every Act 425 agreement presented to the SBC is invalid. This attitude is reflective of the problem that *Casco Twp* has perpetuated, whereby it is now presumed that every Act 425 agreement is invalid if it interferes with a city's or a developer's preference for annexation. This is just the opposite of what the Legislature intended, whereby Act 425 agreements (a) are presumed to be effective (MCL 124.30), and (b) are *specifically intended* to prevent annexation (MCL 124.29). The Court should overrule *Casco Twp* to effectuate the Legislature's true intent.

## V. THE CITY IS RELYING ON SBC "FINDINGS" THAT DO NOT EXIST

Similar to TeriDee, the City does a fine job of pointing out the obvious faults of *Casco Twp*. The City does this by citing to the supposed "findings" the *Casco* circuit court relied on to invalidate the *Casco* agreements (City Brief at p. 21, 3rd full ¶) – *none* of which were made by the SBC (Appendix, 1367a-1368a), and which are therefore dictum, and which otherwise reflect an improper exercise of judicial authority. And also like TeriDee, the City jumps off the erroneous platform created by this particular aspect of *Casco Twp*, and therefore feels entitled to "invent" SBC findings that do not actually exist in this case, by claiming that the SBC determined, "as a factual matter," that the Townships' Agreement was "a sham." City Brief at p. 19. But there is no such SBC finding of fact; it doesn't exist. Appendix, 12a-14a. And so once again, we see the dangerous precedent *Casco Twp* has set, where members of the bar now find it acceptable – just as the *Casco Twp* court did – to invent non-existent SBC findings to justify its decisions, whenever the actual findings are insufficient to do so. The Court should stop this practice by overruling *Casco Twp*.

## VI. THE CITY IS MAKING IRRELEVANT AND FALSE ALLEGATIONS

The City has invented novel ways to attack the Act 425 Agreement, alleging that it is invalid because Clam Lake has agreed to bear the legal cost of defending and implementing aspects of the Agreement. City Brief at p. 22. These allegations are irrelevant because they do not bear on the validity of an Act 425 agreement. There is nothing in Act 425 stating that an agreement cannot include provisions relating to allocation of litigation or implementation costs.[8] The Court would have to re-write Act 425 to invalidate the Agreement on either of these bases, which, of course, cannot be done. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63, 66; 642 NW2d 663 (2002).

The City also falsely alleges that the Agreement makes Clam Lake "solely responsible" for paying and financing all of Haring's costs for water and wastewater infrastructure. City Brief at p. 22. That is incorrect. Under the Agreement, Clam Lake is responsible *only* for the initial cost of "extending [wastewater & water lines] to the Transferred Area." Appendix, 729a. And the parties have agreed that Haring will reimburse Clam Lake for a portion of those costs (*id*., 747a [Art. II) through a development and payback agreement, by which Clam Lake will reimburse TeriDee for a fair proportion of the upfront costs TeriDee expends to finance the extensions. *Id*., 1476a-1477a. The Court should disregard the City's attempt to falsely portray the Agreement in any other manner.

## VII. THE GIFTOS E-MAILS ARE NOT INCRIMINATING

Similar to TeriDee, the City makes the Giftos e-mails the thematic centerpiece of its appeal brief. City Brief at pp. 23-27. But once again, the City cannot explain how the personal opinions of one neighborhood gadfly can be used to impugn the motives of 12 different Board members – only one of whom even read Giftos' e-mails. The City does, however, make at least a feeble attempt to magically convert Mr. Giftos opinions into those of the Townships Boards: the City repeatedly

[8] And to the contrary, §6 of Act 425 states that an Act 425 agreement may include provisions for responding to liabilities incurred in the performance of the agreement. MCL 124.26(f).

points out that he is a member of the Haring Planning Commission. *Id*. The Townships' blunt reply is, "So what?" It would not matter if Mr. Giftos' title was the "Supreme Commander in Chief of the Planning Commission." All this would mean is that he had absolutely nothing to do with developing the Act 425 Agreement, because planning commissions have nothing to do with Act 425 agreements. This is what Mr. Giftos admitted in the exact same e-mails upon which the City attempts to rely: "[W]e are all being told about several situations when all the information is secondhand and not necessarily accurate." Appendix, 124a. If, as the City falsely speculates, Mr. Giftos was "plotting" with Township Board members, why would he have to rely on "secondhand" information that is "not . . . accurate"? And if Mr. Giftos had any involvement in the Act 425 process, why did he need to e-mail Supervisor Rosser to find out what was going on? *Id*., 121a. As these e-mails demonstrate, Mr. Giftos wasn't involved, and that's why he had no idea what was going on. The City is spinning a web of pure fantasy when it attempts to make Giftos the official spokesman of the Townships.

Besides that, if Giftos' e-mails are read with the understanding that he is a homeowner who lives directly across from the TeriDee property and who openly opposes the TeriDee project, his type of comments should be expected. These are the typical type of public comments that elected officials expect to receive when embroiled in an annexation matter for which there is significant public opposition. The messages of course have an inflammatory "edge" to them, for the reason that persons like Mr. Giftos, who are facing the prospect of having their residential neighborhood destroyed by out-of-town developers, are understandably agitated by TeriDee's callous indifference to the regional plan and to the welfare of surrounding residents. It is unfortunate that the SBC let their sensibilities be affected by this type of normal public agitation and comment. It is what the public is *supposed* to do in a representative democracy: petition their government officials for redress of their concerns. The Court should bring reason back to the forefront, and not let the validity of a fully-compliant Act 425 Agreement turn on the existence of emotional public comment.

## VIII. THE APPLICABILITY OF COLLATERAL ESTOPPEL IS PRESERVED

The City argues that the Townships' collateral estoppel argument is not preserved. City Brief at p. 30. While the Townships did not use the phrase "collateral estoppel" in its SBC pleadings, it would be error to conclude that the omission of these exact words results in non-preservation. The Townships did not need to raise the "identical" argument below to preserve it; it is enough that they raised the same "central issue." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 290, n3; 818 NW2d 460 (2012). And the Townships did raise this same "central issue." In the first pleading the Townships filed with the SBC on 8/2/13, the Townships argued that the SBC should deny the annexation petition because it was identical to the first petition, and nothing had changed in the brief interim. Appendix, 859a-860a. The Townships continued their same objection in their 30-Day Submission, filed with the SBC on November 22, 2013. *Id.*, 1041a-1042a, 1054a. The issue is therefore preserved. Moreover, the applicability of collateral estoppel is a question of law for which the factual record is complete, and so the issue is ripe for appellate review, whether preserved or not. *Greenville Lafayette* at 290, n3. Further, as an issue of first impression in Michigan, it is important to decide this matter now, to resolve not only this appeal, but to also ensure that the SBC conducts itself lawfully in the future, by not making arbitrary and conflicting decisions on re-applications.

## REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court reverse and vacate the SBC's decisions in all respects.

Respectfully submitted,

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Dated: August 25, 2016

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